

BOARD OF COUNTY COMMISSIONERS

AGENDA ITEM SUMMARY

Meeting Date: June 16, 2004

Division: Growth Management

Bulk Item: Yes No X

Department: N/A

AGENDA ITEM WORDING: Consideration of a possible settlement agreement in the case of Industrial Communications and Electronics v. Monroe County regarding the proposed 1,000 foot communications tower in Cudjoe Key.

ITEM BACKGROUND: In response to a request from Industrial Communications and Electronics, the Board of County Commissioners on May 19, 2004, agreed to meet at its next regularly scheduled meeting with that firm's legal counsel, Mr. David Paul Horan, to discuss a proposed settlement agreement. To assist the Board of County Commissioners in its consideration of the proposed settlement, as outlined in Mr. Horan's letter, the Growth Management Division has prepared a staff memorandum. The memorandum provides a brief description of the proposed settlement, information on the Coast Guard's Rescue 21 Project and implementation plans for Florida Keys, and a summary of staff concerns with the proposed settlement.

PREVIOUS RELEVANT BOCC ACTION: Board approved entering into a stipulated agreement with ICE to stay appeal order by the 11th Circuit Court of Appeals until it had an opportunity to hear and discuss the proposed settlement agreement at an appropriate time and venue.

CONTRACT/AGREEMENT CHANGES: N/A

STAFF RECOMMENDATIONS: See staff report.

TOTAL COST: N/A

BUDGETED: Yes No

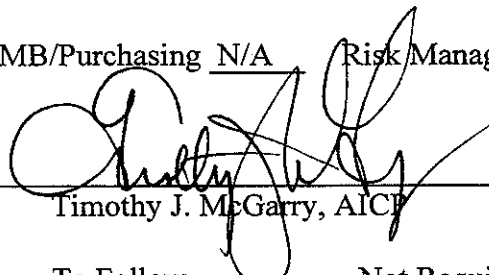
COST TO COUNTY: N/A

SOURCE OF FUNDS:

REVENUE PRODUCING: Yes N/A No **AMOUNT PER MONTH** **Year**

APPROVED BY: County Atty N/A OMB/Purchasing N/A Risk Management N/A

DIVISION DIRECTOR APPROVAL:



Timothy J. McGarry, AICP

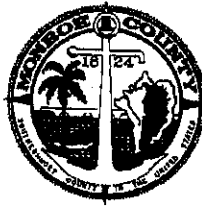
DOCUMENTATION: Included X To Follow Not Required

DISPOSITION:

AGENDA ITEM # L2

County of Monroe


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Board of County Commissioners
Mayor Murray Nelson, District 5
Mayor Pro Tem David Rice, District 4
Comm. Charles "Sonny" McCoy, District 3
Comm. George Neugent, District 2
Comm. Dixie Spehar, District 1

MEMORANDUM

TO: Board of County Commissioners

FROM: Timothy J. McGarry, AICP 
Director of Growth Management

DATE: May 28, 2004

SUBJECT: **Background Information for Discussion of Proposed Settlement Agreement between Industrial Communications and Electronics**

Overview

At its regularly scheduled May 19, 2004, meeting, the Board of County Commissioners directed the County Attorney to enter into a stipulated agreement with Industrial Communications and Electronics (ICE) staying the pending appeal order by the 11th Circuit Court of Appeals until the Board of County Commissioners had an opportunity to hear and discuss the proposed settlement agreement at its Marathon meeting on June 16, 2004. A copy Mr. David Paul Horan's letter, legal counsel for ICE, laying out a proposed settlement agreement in conceptual form is attached.

Proposed Settlement Agreement

In his letter, Mr. Horan refers to a U.S. Coast Guard project for a national project called "Rescue 21". Among other things, this involves the placement of towers around the U.S. coastline to instantly triangulate radio transmissions. A description of this project from a government resource web page is attached.

In his letter, Mr. Horan states that under Rescue 21, the Coast Guard is planning to construct a 1,500 foot communications tower in Saddlebunch Key (MM 15) and another tower in Islamorada (MM-79). He indicated that federally-owned towers do not allow co-location.

The gist of his letter is that if the County agrees to allow his client's 1,000 foot communications tower to be built, then the Coast Guard will co-locate on this tower obviating the need for the

proposed 1,500 foot tower. It is unclear from his letter whether such a scenario would preclude the necessity for another tower in Islamorada.

He further opines that the County could justify the issuance of the permit to ICE under the proposed settlement based on the tower ordinance that was in effect when the ICE application for the tower was submitted. If the County doesn't go along with the settlement, not only will the Coast Guard construct the 1,500 foot high tower, but the County would have to rescind the permanent conservation easement conveyed to the County on the subject property and allow the continued operation of the borrow pit. No wetlands restoration would occur.

Contact with the Coast Guard on Rescue 21 Project

On May 25, the Growth Management Director contacted Lt. Sam Edwards (202.267.0902), Public Affairs Officer for the Rescue 21 Project to obtain the facts concerning implementation plans and schedule for Key West and the Florida Keys. When questioned about the proposed 1,500 square foot tower, he indicated the proposed plan for Key West submitted by General Dynamics (project contractor) had been rejected by the Coast Guard in March of this year.

Lt. Edwards stated that the major reason for this rejection was the Coast Guard's concerns about the risks of degradation for such a high tower from hurricanes. The components of the Rescue 21 systems need to be fully operational and reliable during and after even catastrophic storm events.

When Lt. Edwards mentioned that the typical height of such towers being constructed for the Coast Guard under Rescue 21 was under 400 feet, I asked him why the contractor proposed a 1,500 foot high tower. Without having the specific plan information before him, he offered the opinion that it had to do with increased coverage area, possibly reducing the need for other towers to adequately cover the coastline.

As for Coast Guard policies concerning co-location, Lt. Edwards indicated co-location on privately-owned towers was an option; however, any such tower would have to meet the operational and maintenance requirements established for the Rescue 21 project.

He further indicated that General Dynamics would be coming back to the Coast Guard with a revised plan for Key West within two to four months. When asked if the Coast Guard would favorably reconsider placement of a 1,000 foot or higher tower, he indicated that he would not rule it out, but the Coast Guard has definite concerns about the risks with tall towers.

Lt. Edwards also confirmed that such a project was subject to the National Environmental Policy Act and Endangered Species Act. His agency had consultation agreements with the U.S. Fish and Wildlife Service and Environmental Protection Agency.

Staff Concerns

The staff has the following concerns with the proposed settlement:

- o The appellant has not provided any tangible quid pro quo solution that would benefit the County to enter into a settlement at this time. The Coast Guard has rejected plans for a 1,500 foot communications tower and it will be at least two to four months before any new plans are approved. Even if the County were to agree to enter into the proposed settlement by granting a permit for the 1,000 foot communications tower to ICE, no guarantee exists that the Coast Guard would ever co-locate on that communications tower.
- o The statement in Mr. Horan's letter that if the ICE tower is not permitted the permanent conservation easement on the subject property at Cudjoe Key will have to be rescinded and continued operation of the borrow pit will have to be allowed does not accurately reflect the situation. Under the Chapter 380.032, F.S. agreement entered into in 1999 between DCA and Mr. Frank Dirco (ICE), ICE is required to annually obtain renewal of all required County permits for the mining operations on the site. ICE failed to renew its annual County excavation permit in 2003 and the DEP permit expired on April 12, 2004. Therefore to reinstate mining operations, he will need to submit permit applications and be issued new permits.

More importantly, ICE is still bound by the wetlands restoration plan and reclamation requirements of a 1998 Settlement Agreement, which were modified by the Chapter 380 Agreement between Mr. Dirco (ICE) and DCA. The 1998 agreement requires all mining to cease and restoration to be completed by July 16, 2008.

- o Mr. Horan's rationale that the legal justification for the County issuing the tower permit as part of a settlement agreement presumes that the conditional use would have been approved by the Planning Commission. Even under the old ordinance the height of the tower in relationship to existing towers in the County and its proposed location make it highly problematic that conditional use would be granted due to these possible adverse impacts on community character.

Recommendation

Unless more compelling reasons or arguments are presented for settlement of this case, the Growth Management Division staff believes it would premature to pursue the proposed settlement.

Attachments



Coast Guard updates its disaster call system

11/18/02

By Preeti Vasishtha,
GCN Staff

Rescue 21 will address signal coverage gaps, inadequate capacity, garbled signals and interoperability with other agencies

The Coast Guard is modernizing the way it monitors distress calls from vessels.

The agency in September awarded a 19-year, \$611 million contract to General Dynamics Corp. to begin work on the Rescue 21 project. Through the project, the Guard will upgrade its 30-year-old, short-range analog communications network, the National Distress and Response System, which no longer supports the Coast Guard's communications needs in coordinating search-and-rescue operations, said Capt. Ronald T. Hewitt, NDRS modernization project manager.

Rescue 21 will improve the agency's ability to receive rescue calls from boaters, pinpoint their locations and coordinate rescues, Hewitt said.

Agency officials had been concerned that the contract might be held up because of an Office of Management and Budget directive halting infrastructure projects at agencies slated to become part of the proposed Homeland Security Department. But Hewitt said the Homeland Security IT Investment Review Group, which is looking to consolidate IT projects at HSD-bound agencies, decided the Rescue 21 was mission-critical and gave approval to proceed.

The Guard expects to complete the rollout of Rescue 21 by Sept. 30, 2006.

General Dynamics next year will start deploying it in Atlantic City, N.J., and some parts of Maryland. The next deployments will be in St. Petersburg, Fla.; Mobile, Ala.; and along the coast of Washington state.

"Simply put, this new system will be the maritime equivalent of a 911 system, enhancing maritime safety by helping to minimize the time that search-and-rescue teams spend looking for people in distress," Transportation secretary Norman Y. Mineta said. "And that means saving more lives."

General Dynamics beat out bids by Lockheed Martin Corp. and Scientific Applications International Corp. for the contract, which has a six-year base and three follow-on options—two four-year periods and a five-year period.

Subcontractors include American Nucleonics of Westlake Village, Calif.; CACI International Inc. of Arlington, Va.; Communication Services Inc. of Mesa, Ariz.; Fuentze Systems Concepts Inc. of Charleston, S.C.; Integrated Defense Solutions Inc. of Austin, Texas; L&E Associates of Oxon Hill, Md.; and Motorola Inc.

Coastal network

The existing network of 284 VHF-FM antenna sites with analog transceivers lies along the East and West coasts, Hewitt said. Each site covers 20 to 30 nautical miles.

There are 46 communications centers monitoring the antenna sites. One communications center typically monitors messages received at two to 10 sites.

The centers use six maritime frequencies, Hewitt said. For instance, vessels send distress signals through VHF-FM Channel 16, at 156.8 MHz, and the center uses other channels to manage search-and-rescue operations. A major problem is that the system can handle only one channel at any time because of a shortage of receiving capacity, Hewitt said.

Also, if two boats try to communicate with a center simultaneously and the signals are the same strength, the center gets a garbled message. If one distress signal is stronger than the other, the weaker signal is lost.

Another problem is that the system does not cover the entire coastline. Despite the antennas' spacing, there are still about 60 spots where vessels cannot communicate with any center. With the new system, the Guard will:

- Greatly reduce the gaps in the communication network
- Increase channel capacity, which will allow simultaneous communications on six channels, including VHF-FM 16
- Gain direction-finding equipment that will pinpoint a distressed vessel closer than is currently possible
- Have digital selective-calling capability that will instantly transmit a vessel's name, location and the nature of its distress
- Use digital recording for instant playback
- Interoperate with other federal, state and local communications systems.

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April 14, 2004

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Tim McGarry, Director
Growth Management Division
Monroe County
Marathon, FloridaRe: Industrial Communications v. Monroe County
Appeal #03-12233-DD

The subject of settlement of this appeal has been before the Commission in "Executive Session".

Industrial Communications & Electronics (ICE) bought the 62-acre Cudjoe borrow pit based upon advice (written) from Monroe County Senior Comprehensive Planner, Chad Meadows. ICE worked for 2 years to help Monroe County originate and pass a Tower Ordinance (#028-1999 approved by DCA 9/14/99). The ordinance had no height limitations. Three (3) moratoriums later, an "Amended Tower Ordinance" was passed prohibiting any tower from being constructed in excess of 300 feet. After the second moratorium, ICE filed suit in the State Court contesting the procedure used by Monroe County in passing the second moratorium. The County prevailed by explaining to the Court that the moratorium was "only" 180 days and was necessary in order to change Monroe County's Comprehensive Plan. Upon expiration of the 180 second moratorium, a third moratorium was entered and, to date, no change in Monroe County's Comprehensive Plan has been made relating to communication towers.

Monroe County asked for and received from ICE/DCA (on 11/9/99) a so-called "380 Agreement" allowing placement of one of the tower anchors in wetlands. On January 20, 2000, Monroe County requested and received a "Permanent Conservation Easement" closing the Cudjoe borrow pit and requiring a considerable amount of wetlands restoration work. This Conservation Easement insures that the easement only

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TIMOTHY S. WALLACE
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Tim McGarry, Director
Growth Management Division
April 14, 2004
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allows the construction of the tower and building housing a communications booth, large diesel generators, etc.. The rest of the property is required to remain in its natural and/or restored state. Monroe County also requested and received a "Co-Location Agreement" requiring ICE to allow the placement of private and public antenna structures on the ICE tower. Sheriff Roth has written the County in support of the ICE tower due to its ability to cover all of Monroe County from one transmitting antenna.

Monroe County staff decided to process the ICE tower application under the Amended Tower Ordinance and ICE filed in Federal Court to require processing under the ordinance that was in effect at the time the ICE tower application was filed. The Court held that the prior State Court action prohibited the federal action. ICE took an appeal, which remains pending.

Recently, the USCG was funded (under Homeland Security provisions) for a national project called "Rescue 21". This involves placement of towers around the U.S. coastline to instantly triangulate radio transmissions. The contractor for the USCG is General Dynamics (Mr. Mark Fitzgerald (480) 441-3559 of Phoenix, AZ).

If the Industrial Communications tower is permitted and built, then this one tower will be used instead of towers being constructed for the USCG on federal lands along the Keys, without the need - or opportunity - for input from Monroe County. Attached are the drawings for the proposed 1500 ft. tower at Saddlebunch Key (MM-15). The "Rescue 21" plan also includes a tower in Islamorada (at MM-79). Federal towers do not allow co-location and the Permanent Conservation Easement previously conveyed to Monroe County will have to be rescinded and continued operation of the borrow pit will have to be allowed. There will be no wetlands restoration.

Finally, settling the Federal Court appeal with Industrial Communications will not create any dangerous/future precedent that can be used against Monroe County. The Cudjoe site is the only place in Monroe County where a tall civilian tower can be constructed. The legal justification for settlement is that our permit would be issued under the original tower ordinance that was in effect when the Industrial Communications application for the tower permit was submitted.

Tim McGarry, Director
Growth Management Division
April 14, 2004
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This settlement helps Homeland Security and is supported by Sheriff Roth, the INS, DEA and USCG, it allows future co-location of antennas and it settles litigation with Monroe County.

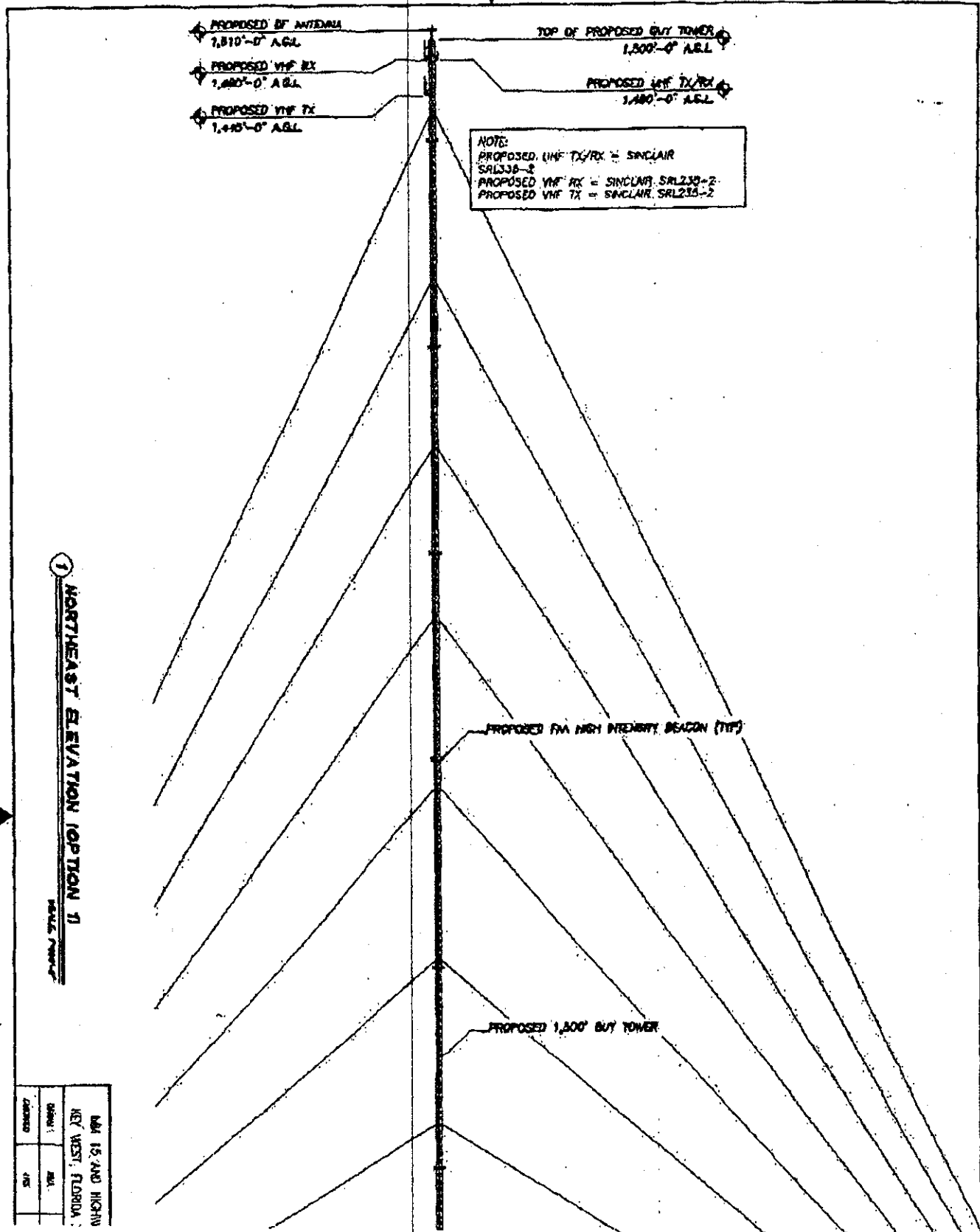
Sincerely yours,



DAVID PAUL HORAN
For the Firm

DPH:krh

Attachments as stated.



MURAN & WALLACE	
KEY WEST, FLORIDA	
DATE	REV.
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04/14/04	1



Figure 5-52. Saddlebunch Site Title Sheet, Vicinity Map, and General Information